

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Bright House Networks, LLC)	CSR 6925-E
)	
Petition for Determination of Effective)	
Competition in Plant City, Florida (FL0199) and)	
Tampa, Florida (FL0706))	

MEMORANDUM OPINION AND ORDER

Adopted: February 27, 2007

Released: March 1, 2007

By the Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION

1. Bright House Networks, LLC ("Bright House") has filed with the Commission a petition pursuant to Sections 76.7 and 76.905(b)(2) and 76.907 of the Commission's rules seeking a finding of effective competition in Plant City, Florida and Tampa, Florida.¹ Bright House alleges that its cable systems serving the franchise areas are subject to effective competition pursuant to Section 623(l)(1)(b) of the Communications Act of 1934, as amended ("Communications Act")² and therefore exempt from cable rate regulation because of competing service provided by two direct broadcast satellite ("DBS") providers, DirecTV, Inc. ("DirecTV") and DISH Network ("DISH"). Both the City of Plant City, Florida and the City of Tampa filed an opposition, to which Bright House replied.³

2. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition,⁴ as that term is defined by Section 76.905 of the Commission's rules.⁵ The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition is present within the relevant franchise area.⁶ Based on the record in this proceeding, Bright House has met this burden in Plant City and in Tampa.

II. DISCUSSION

3. Section 623(l)(1)(B) of the Communications Act provides that a cable operator is subject to effective competition if the franchise area is (a) served by at least two unaffiliated multi-channel video programming distributors ("MVPD") each of which offers comparable video programming to at least 50 percent of the households in the franchise area; and (b) the number of households subscribing to

¹ See 47 C.F.R. §§ 76.7(a)(1); 76.905(b)(2) & 76.907.

² See 47 U.S.C. § 543(a)(1).

³ The City of Plant City also filed a Response to Reply, to which Bright House responded in a Surreply.

⁴ 47 C.F.R. § 76.906.

⁵ 47 C.F.R. § 76.905.

⁶ See 47 C.F.R. §§ 76.906 & 907.

programming services offered by MVPDs other than the largest MVPD exceeds fifteen percent of the households in the franchise area.⁷ Turning to the first prong of the competing provider test, DBS service is presumed to be technically available due to its nationwide satellite footprint, and presumed to be actually available if households in a franchise area are made reasonably aware that the service is available.⁸ Bright House has provided evidence of DirecTV and DISH's comprehensive Internet websites and toll-free phone numbers for ordering DBS service.⁹ The two DBS providers' subscriber growth reached approximately 26.1 million as of June 2005, comprising approximately 27.7 percent of all MVPD subscribers nationwide; DirecTV has become the second largest, and DISH the third largest, MVPD provider.¹⁰ Plant City contends that Bright House has failed to show that potential subscribers are reasonably aware that DBS service is available in Plant City.¹¹ Bright House replies that the DBS penetration level it calculated for Plant City is above 15 percent and that the Commission has accepted such subscriber levels as evidence that local residents are well aware of their ability to obtain service from a DBS provider.¹² We agree. In view of the DBS growth data described above, and the data discussed below showing that more than 15 percent of the households in Plant City and Tampa are DBS subscribers, we conclude that the populations of the franchise areas at issue here may be deemed reasonably aware of the availability of DBS services for purposes of the first prong of the competing provider test.

4. With respect to the issue of program comparability, we find that the programming of the DBS firms satisfies the Commission's program comparability criterion because they offer at least 12 channels of video programming, including at least one non-broadcast channel.¹³ We find that Bright House has demonstrated that the franchise areas are served by at least two unaffiliated MVPDs, namely the two DBS providers, each of which offers comparable video programming to at least 50 percent of the households in the community.¹⁴ Bright House also demonstrated that the two DBS providers are physically able to offer MVPD service to subscribers in the community, that there exists no regulatory, technical, or other impediments to households within the community taking the services of the DBS providers,¹⁵ and that potential subscribers in the community have been made reasonably aware of the MVPD services of DirecTV and DISH. Accordingly, we find that the first prong of the competing provider test is satisfied.

5. The second prong of the competing provider test requires that the number of households subscribing to MVPDs, other than the largest MVPD, exceed 15 percent of the households in a franchise area. Bright House states that it is the largest MVPD in the franchise areas.¹⁶ Bright House Networks

⁷47 U.S.C. § 543(1)(1)(b); *see also* 47 C.F.R. § 76.905(b)(2).

⁸*See MediaOne of Georgia*, 12 FCC Rcd 19406 (1997).

⁹*See* Bright House Petition at 4-5.

¹⁰ *Twelfth Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, FCC 06-11, at ¶¶ 6, 13, 72-73 (rel. March 3, 2006).

¹¹ Opposition of the City of Plant City at 3; *see also* Plant City Response to Reply at 2-3. Specifically, Plant City contends that marketing information on a website is not enough to meet the evidentiary standard of local reasonable awareness.

¹² Bright House Reply at 2-3, n. 7 (citing *Time Warner Entertainment – Advance/Newhouse Partnership*, DA 02-2505 at ¶4 (rel. Sept. 23, 2005)).

¹³*See* 47 C.F.R. § 76.905(g); *see also* Bright House Petition at 6-7.

¹⁴ Bright House Petition at 7.

¹⁵ *Id.* at 4.

¹⁶ *Id.* at 8.

sought to determine the competing provider penetration in the franchise areas by using a five-digit zip code allocation formula, using data from the Satellite Broadcasting and Communications Association (“SBCA”), to calculate the DBS firms’ subscribership in each franchise area.¹⁷ The SBCA reports showed that there are an aggregate of 3,371 DBS subscribers in Plant City and 35,604 in Tampa.¹⁸ Bright House Networks multiplied these figures with the derived allocation percentages to calculate the total number of subscribers allocated to the franchise areas.¹⁹ It then divided that number by the total number of franchise households from 2000 U.S. Census data.²⁰ Based on this method and data, Bright House Networks showed that the competing provider penetration rate in Plant City is 19.82 percent and in Tampa is 15.88 percent.²¹

6. In opposition, Plant City and Tampa allege that, due to errors in its petition, Bright House has not met its burden of demonstrating that the number of households subscribing to DBS exceeds 15 percent.²² Plant City alleges that the DBS penetration level calculated for Plant City by Bright House is incorrect because it was based on SBCA five-digit zip code data and an allocation ratio.²³ Instead, Plant City states that Bright House should have used SBCA zip code plus four data to obtain a more accurate DBS penetration figure.²⁴ In addition, Plant City argues that Bright House improperly used outdated data from the 2000 U.S. Census in its calculations, rather than more recent and accurate occupied household data from Plant City.²⁵ Plant City explains that 2005 data created by the planning commission, reduced by an 8 percent household vacancy rate provided by the U.S. Census, shows that the most reliable figure of occupied households in Plant City is 12,061.²⁶ Furthermore, Plant City states that Commission rules require the exclusion of households that subscribe to both the largest MVPD provider and DBS.²⁷ Calculating penetration levels using Plant City’s household numbers, SBCA zip code plus four data, and adjusting for seasonal and dual subscribers, Plant City stated that only 13.14 percent residents subscribe

¹⁷ *Id.* at 8-9; Exhibits D & E.

¹⁸ *Id.* at Exhibit D.

¹⁹ *Id.* at Exhibit E. The allocation percentages were derived by dividing the total number of franchise households (based on 2000 U.S. Census data) by the total number of five-digit zip code households (based on data from Media Business Corporation). Exhibits B, C & E. The allocation percentage for Plant City was 64% and for Tampa was 56%. Thus, the total direct-to-home subscribers allocated to the franchise area for Plant City was 2,151 and for Tampa was 19,817.

²⁰ *Id.* Exhibit E. The total number of franchise households for Plant City was 10,849 and for Tampa was 124,758.

²¹ *Id.* (Plant City = $2151/10849=19.82\%$; Tampa = $19817/124758 = 15.88\%$).

²² Plant City Opposition at 5-8; Plant City Response to Reply at 4-6; Tampa Opposition at 2-5.

²³ *Id.* at 5.

²⁴ *Id.* at 5.

²⁵ The U.S. Census data from 2000 indicates that the number of Plant City households was 10,849. Bright House Petition at Exhibit C.

²⁶ Plant City Opposition at 6, n. 19. Plant City notes that the Commission “‘has consistently accepted household data from sources other than the Census,’ where such data provides ‘a sufficiently reliable basis for an effective competition determination.’” *Id.* at n. 19 (citing *Charter Communications v. Thirteen Oregon Communities*, DA No. 05-1649 (rel. June 9, 2005); *Texas Cable Partner, L.P.*, 16 FCC Rcd 4718, 4721 (2001)). Plant City uses data from the Hillsborough County City-County Planning Commission as its occupied household data. Hillsborough compared municipal certificates of occupancy with its building permit records to determine the number of unoccupied households in Plant City. This figure (13,110), adjusted by the 8% vacancy rate described above, totals 12,061 occupied households. *Id.* at 6-7, n. 19.

²⁷ *Id.* at 7 (citing 47 C.F.R. §905(b)(2) (“The number of households subscribing to multichannel video programming other than the largest multichannel video program distributor exceeds 15% of the households in the franchise area.”)).

to DBS.²⁸ Without adjusting for dual subscribers, Plant City calculated the penetration rate at 14.93 percent.²⁹ Tampa also contends that local government housing unit data from 2005, adjusted by an occupancy percentage derived from the U.S. Census and Tampa total housing unit data, is the best and most recent data for purposes of determining DBS penetration.³⁰ In addition, Tampa contends that the SBCA data used by Bright House is inaccurate because it does not distinguish between active and inactive accounts, between complimentary versus paid accounts, and provides no indication of how or when the data set was “cleaned” and corrected for any discrepancies.³¹ Furthermore, Tampa criticizes Bright House for including subscribers from a zip code that Tampa contends falls outside Tampa city limits.³²

7. In Reply, Bright House contends that its use of 2000 U.S. Census data is proper, that it included all relevant zip codes for calculating penetration levels in Tampa, and that DBS penetration in Plant City exceeds 15 percent.³³ With respect to U.S. Census data, Bright House states that the Commission has consistently approved of using of 2000 Census data in effective competition cases and has previously rejected using alternative housing data from Hillsborough County.³⁴ Regarding the zip code that Tampa alleges falls outside its city limits, Bright House explains that Media Business Corporation, which provided the data Bright House used in making its calculations, listed that zip code as overlapping with the City of Tampa.³⁵ Bright House states that the Commission has repeatedly allowed data from Media Business Corporation to be used for identifying overlapping zip codes and the number of households within those zip codes.³⁶ As far as calculating DBS penetration in Plant City, Bright House contends that using a five-digit allocation methodology was proper.³⁷ It explains that the Commission has repeatedly accepted that methodology, as well as the zip code plus four methodology that Plant City prefers.³⁸ Bright House notes that the Commission has never stated that one methodology is preferred over another.³⁹ Nonetheless, Bright House submitted DBS penetration levels for Plant City using zip code plus four data, based on reports Bright House purchased from SBCA.⁴⁰ Noting that Plant City failed to identify 277 overlapping plus four zip codes in Plant City, representing 377 subscribers, Bright House

²⁸ *Id.* at 6-8. Plant City subtracted 16 subscribers from the SBCA zip + 4 data, based on U.S. Census data which showed that .89% of Plant City homes are seasonal (.89% x 1817 zip+4 subscribers = 16). Plant City subtracted an additional 216 dual subscribers, based on a 12% national dual subscriber rate noted in a 2003 SkyTRENDS data report.

²⁹ *Id.* at 8.

³⁰ Tampa Opposition at 3-4 (citing *In re Bright House Networks, LLC Petition for Determination of Effective Competition in Unincorporated Hillsborough County, Florida*, DA 05-2850, CSR 6133-E (rel. Oct. 28, 2005)); Exhibit 2.

³¹ *Id.* at 5.

³² *Id.* at 4-5.

³³ Bright House Reply at 3-5.

³⁴ *Id.* at 4 (citing *Bright House Networks, LLC (Unincorporated Hillsborough County, Florida)*, DA 05-2850 at ¶10 (rel. Oct. 28, 2005)).

³⁵ *Id.* at 4.

³⁶ *Id.* at 4-5, n. 12 (citing *Time Warner Entertainment – Advance/Newhouse Partnership* (Nineteen California franchise areas), DA 05-2642, ¶7 (rel. Oct. 28, 2005)).

³⁷ *Id.* at 5.

³⁸ *Id.*

³⁹ *Id.*, n. 14 (citing *Bright House Networks LLC*, DA 05-2511 (2005)).

⁴⁰ *Id.* at 5-7, Exhibits 2 & 3

claims that Plant City's DBS penetration calculations are incorrect.⁴¹ Bright House states that adding the 377 missing subscribers to Plant City's total (1817), and dividing by Plant City's household count of 12,061 results in a DBS penetration rate of 18.19 percent.⁴² Adjusted to account for seasonal homes, Bright House calculates the penetration rate at 18.03 percent.⁴³ Either way, Bright House states that Plant City's DBS penetration exceeds the 15 percent threshold.

8. In its Response to Reply, Plant City contends that despite Bright House's arguments, the DBS penetration still falls below the 15 percent threshold. Plant City explains that Bright House improperly included all of the 217 zip codes and associated 377 subscribers in its calculations.⁴⁴ It explains that 38 zip codes, accounting for 64 subscribers, were double counted, and that 21 zip codes representing 46 subscribers, are located outside the franchise area.⁴⁵ It states that 9 zip codes, along with its 8 subscribers, also should be excluded because the city confirmed that the zip codes are commercial and not residential.⁴⁶ Further, Plant City states that 23 subscribers should be excluded because city inspectors could not confirm that those subscribers existed.⁴⁷ Accounting for these changes, and adjusting for seasonal and dual subscribers, Plant City calculated the DBS penetration level for Plant City as 14.85 percent.⁴⁸

9. In its Surreply, Bright House offers additional evidence to show that both Plant City and Tampa exceed the 15 percent DBS penetration threshold. For Tampa, Bright House offered updated SBCA five-digit zip code DBS subscriber data, which showed an increase from the figures listed in its Petition.⁴⁹ In addition, Bright House excluded from this figure data from the zip code that Tampa alleged was not within its city limits.⁵⁰ Using these updated numbers, plus the occupied household figures offered by Tampa in its Opposition, Bright House calculates that the DBS penetration rate in Tampa is 15.76 percent.⁵¹ For Plant City, Bright House offered updated SBCA zip code plus four data for the same 1331 plus four zip codes used by Plant City in its Opposition.⁵² The data shows 1886 DBS subscribers, which when divided by the occupied household figures offered by Plant City in its opposition, equals a 15.61 percent DBS penetration rate.⁵³ In addition, Bright House contends that Plant City improperly excluded subscribers that its city inspectors could not confirm existed, stating that the Commission has "unequivocally deemed anecdotal visual observations/house by house surveys to be unacceptable means

⁴¹ *Id.* at 6-7.

⁴² *Id.* at 7.

⁴³ *Id.* at 7, n. 16.

⁴⁴ Plant City Response to Reply at 4-6.

⁴⁵ *Id.* at 5.

⁴⁶ *Id.*

⁴⁷ *See id.* "Sixteen out of the 25 zip codes representing possible commercial accounts were inspected and identified by Plant City's Engineering staff as in fact residential, but only 29 satellite dishes were counted, versus 52 satellite subscribers listed for these zipcodes by Bright House." *Id.* at 5 (52-29 = 23).

⁴⁸ Using 2005 occupied household data from the local government as described in ¶6. *Id.* at 6.

⁴⁹ Bright House Surreply at 4-5; Exhibit C.

⁵⁰ *Id.* at 5 n. 12.

⁵¹ *Id.* at Exhibit C.

⁵² *Id.* at 6.

⁵³ *Id.* at 7. Incorporating subscribers associated with zip codes that Bright House said Plant City incorrectly excluded and did not object to in its Response to Reply, Bright House calculates the DBS penetration rate at 17.5%. *Id.*

to rebut a cable operator's showing of effective competition in a given community using Media Business and SBCA data.⁵⁴ Lastly, Bright House notes that the Commission has rejected Plant City's argument that dual subscribers should be removed before calculating DBS penetration levels.⁵⁵

10. We find that Bright House has met its burden of proving that the DBS penetration rates in Plant City and Tampa exceeds 15 percent. For Tampa, we accept the occupied household data offered by the city. Though we previously have rejected submission of *total housing units* by local governments, here, Tampa adjusted the data to reflect current occupied household numbers.⁵⁶ Second, Tampa did not dispute the updated SBCA or Media Business Corporation five-digit zip code data that Bright House submitted in its Surreply. In addition, we note that in its updated data, Bright House excludes data from the zip code that Tampa contends falls outside city limits. As Tampa offers no support for its claims of alleged problems with SBCA data, we accept the use of such data as we have in previous petitions.⁵⁷ Therefore, calculating DBS penetration levels in Tampa with uncontested updated data and two assumptions favorable to Tampa, the DBS penetration rate is 15.75 percent.⁵⁸ For Plant City, we also accept Plant City's household numbers, as opposed to 2000 U.S. Census data, for the reasons stated above.⁵⁹ We also note that Plant City did not dispute the updated SBCA zip code plus four data submitted in Bright House's Surreply. We reject Plant City's contention that dual subscribers should be removed from our calculations. As we noted in the *Mediacom Minnesota* Petition, excluding dual subscribers would "permit an absurd finding of no effective competition where 85 percent of households were dual cable/DBS subscribers, as long as less than 15 percent of households subscribed only to DBS... the very essence of MVPD competition that Section 632 of the Communications Act addresses."⁶⁰ Therefore, using the updated data based *only on the zip codes offered in Plant City's Opposition* and Plant City's household numbers, Plant City's DBS penetration rate exceeds the 15 percent threshold at 15.61 percent. Even adjusted for seasonal homes as Plant City argued in its Opposition, Plant City still exceeds the 15 percent threshold at 15.4 percent. Therefore, the second prong of the competing provider effective competition test is satisfied.

11. Bright House satisfied the first prong of the competing provider test, by demonstrating that the DBS providers offer comparable programming to at least fifty percent of the franchise areas. In addition, Bright House has satisfied the second part of the competing provider test by establishing that the DBS providers serve at least 15 percent of the franchise areas. Based on the foregoing, we conclude that Bright House has submitted sufficient evidence demonstrating that its cable systems serving the franchise areas are subject to "competing provider" effective competition.

⁵⁴ Bright House Surreply at 8 (citing *Time Warner Entertainment Company*, 18 FCC Rcd 13043, ¶¶6, 10 (2004); *Cablevision of Paterson*, 17 FCC Rcd 17239, ¶7 (2002)).

⁵⁵ Bright House Surreply at 8-9 (citing *Memorandum Opinion and Order*, 20 FCC Rcd 5225, ¶10 and n. 29 (2005); *Memorandum Opinion and Order*, 20 FCC Rcd 4984, ¶13 (2005)).

⁵⁶ *In re Bright House Networks*, Petition for Determination of Effective Competition in Unincorporated Hillsborough County, Florida ¶10, CSR 6133-E, DA 05-2850 (rel. Oct. 28, 2005).

⁵⁷ *In re Charter Communications*, Petition for Determination in Eight Virginia Communities at ¶¶10-11; CSR-6136-E, DA 04-1011 (rel. April 2004).

⁵⁸ Bright House Surreply at 5, Exhibit C. Exhibit C shows that the updated five-digit zip code data from MBC rose to 21,897, which when divided by Tampa's household number of 135,880, results in an allocation percentage of 62%. Multiplying that allocation percentage against the updated SBCA five-digit zip code data (34,504) results in a total of 21,410.39. Dividing that by the number of households in Tampa comes to 15.76%.

⁵⁹ Plant City states that it has 12,061 households, based on total housing units adjusted for vacancy rates. Plant City Opposition at 6.

⁶⁰ *In re Mediacom Minnesota LLC*, Petition for Determination of Effective Competition in Sixteen Minnesota Communities ¶13, CSR 6241, DA 05-546 (rel. March 7, 2005).

III. ORDERING CLAUSES

12. Accordingly, **IT IS ORDERED** that the petition for a determination of effective competition filed in the captioned proceeding by Bright House Networks, LLC **IS GRANTED**.

13. **IT IS FURTHER ORDERED** that the certifications of Plant City, Florida and Tampa, Florida to regulate basic cable service rates **ARE REVOKED**.

14. This action is taken pursuant to delegated authority pursuant to Section 0.283 of the Commission's rules.⁶¹

FEDERAL COMMUNICATIONS COMMISSION

Steven A. Broeckaert
Deputy Chief, Policy Division, Media Bureau

⁶¹47 C.F.R. § 0.283.

CSR 6925-E

COMMUNITY SERVED BY BRIGHT HOUSE NETWORKS, LLC

Communities	CUIDS	CPR*	2005 Occupied Households ⁺	Estimated DBS Subscribers
Plant City	FL0199	15.61%**	12,061	1886 [`]
Tampa	FL0706	15.76% ⁺⁺	135,880	21,410.39***

*CPR=Percent of competitive DBS penetration rate.

** Though Bright House calculates 1886 divided by 12,061 as “at least 15.61%,” our calculation figures show that the penetration is slightly higher at 15.64%. Bright House Surreply at 7.

⁺See Bright House Surreply, Exhibit C.

⁺⁺*Id.*

[`]See Bright House Surreply at 7; Exhibit D.

*** Derived from an allocation formula. See Bright House Surreply, Exhibit C.